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# Keynote Address

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## Keynote Address by Senator Orrin G. Hatch

*21st International Law and Religion Symposium  
Brigham Young University, J. Reuben Clark Law School  
October 5, 2014*

It is my privilege to be with you for the 21st annual International Law and Religion Symposium. I am humbled to be added to the list of distinguished scholars and jurists from around the world who have given this address in the past.

This is an unsettled and unsettling time for religious liberty. Both at home and abroad, religious liberty is under attack. What was once a broad consensus here in the United States that religious freedom deserves special protection has crumbled. Indeed, President Obama and his administration have taken positions that, at best, treat religious liberty as simply an ordinary consideration and, at worst, are openly hostile to religious liberty.

To cite two examples, the administration argued in the Supreme Court that the First Amendment right to the free exercise of religion does not protect a church's decisions to hire or fire its own ministers.<sup>1</sup> The administration also claimed authority to force employers to violate deeply held religious beliefs in providing health benefits to employees.<sup>2</sup> In both cases, the administration's position would make the fundamental and constitutional right of religious exercise secondary to civil and statutory rights. At the state level, small business owners and non-profits across the country have faced fines, sanctions, and even bankruptcy under public accommodations laws for following their religious convictions.<sup>3</sup>

Internationally, we see numerous troubling attacks on religious liberty. In Nigeria, Boko Haram continues to attack, maim, and kill

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1. The Equal Employment Opportunity Commission argued that since religious organizations could "successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association . . . [there is] no need—and no basis—for a special rule for ministers grounded in the Religion Clauses." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

2. *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

3. *See* Neville Rochow, *An Incurable Malaise: Commonwealth v. Australian Capital Territory and Baskin v. Bogan as Symptoms of Early-Onset Dystopia*, 2015 BYU L. REV. 609 (2015); Michael P. Warsaw, Op-Ed., *Contraception, Against Conscience*, N.Y. TIMES, Feb. 21, 2012, <http://www.nytimes.com/2012/02/22/opinion/why-ewtn-wont-cover-contraception.html>.

Christians in its campaign for an Islamic caliphate.<sup>4</sup> In Iran, a man was recently executed for “heresy” after he questioned the interpretation of certain religious texts.<sup>5</sup> Pakistan continues to imprison religious dissenters for blasphemy.<sup>6</sup> One such dissenter was recently killed by his jailer while awaiting trial.<sup>7</sup> The rise of ISIS and other Islamist groups in the Middle East pose significant threats to fragile religious freedoms in that region.<sup>8</sup> And nations from Europe to Australia are considering bans on various types of religious clothing.<sup>9</sup>

In this opportunity to speak with you, I will explain why religious freedom matters, how it is under attack, and what each of us can do to protect this most precious and fundamental freedom.

### I. WHY RELIGIOUS FREEDOM MATTERS

First, I want to address what religious freedom is and why it is important. This picture of religious freedom has three parts. First, religious freedom must be both social reality and legal principle. Second, religious freedom encompasses both belief and behavior, exercised in public as well as in private, and both individually and

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4. See Farouk Chothia, *Who are Nigeria's Boko Haram Islamists?*, BBC (May 4, 2015, 12:44 PM), <http://www.bbc.com/news/world-africa-13809501>; Alexander Smith, *Who Are Boko Haram? Extremists Escalate Nigeria Terror Campaign*, NBC NEWS (Apr. 19, 2014, 7:02 PM), <http://www.nbcnews.com/storyline/missing-nigeria-schoolgirls/who-are-boko-haram-extremists-escalate-nigeria-terror-campaign-n84046>.

5. Saeed Kamali Dehghan, *Iran Executes Man for Heresy*, GUARDIAN (Sept. 29, 2014, 1:15 PM), <http://www.theguardian.com/world/2014/sep/29/iran-executes-man-heresy-mohsen-amir-aslani>.

6. Doug Bandow, *Blasphemous Oppression in the Name of Islam: Hold Pakistan Accountable for Persecuting Religious Minorities*, FORBES (July 14, 2014, 8:42 AM), <http://www.forbes.com/sites/dougbandow/2014/07/14/blasphemous-oppression-in-the-name-of-islam-hold-pakistan-accountable-for-persecuting-religious-minorities/>.

7. *Id.*; Zia ur-Rehman, *A Pakistani Scholar Accused of Blasphemy Is Shot Dead*, N.Y. TIMES, (Sept. 18, 2014), [http://www.nytimes.com/2014/09/19/world/asia/pakistan-shakil-auj-assassinated-blasphemy-karachi.html?\\_r=0](http://www.nytimes.com/2014/09/19/world/asia/pakistan-shakil-auj-assassinated-blasphemy-karachi.html?_r=0).

8. *Middle East Church Leaders: ISIS Ideology Must Be Strongly Condemned, Effectively Destroyed*, ZENIT (Sept. 18, 2014), <http://www.zenit.org/en/articles/middle-east-church-leaders-isis-ideology-must-be-strongly-condemned-effectively-destroyed>.

9. See Anthony Gray, *Religious Freedom and Section 116 of the Australian Constitution: Would a Banning of the Hijab or Burqa be Constitutionally Valid?*, 2011 F. ON PUB. POL'Y, Aug. 2011, available at <http://forumonpublicpolicy.com/vol2011.no2/archivevol2011.no2/gray.pdf> (discussing the banning of the Hijab or Burqa in Australia); *The Islamic Veil Across Europe*, BBC (July 1, 2014), <http://www.bbc.com/news/world-europe-13038095> (discussing the banning of the burka and the niqab across Europe).

collectively. Third, religious freedom is a fundamental human right that must be given preference.

Professor Thomas Berg of the University of St. Thomas writes that one of “America’s greatest contributions to the world” has been establishing religious freedom as both social reality and legal principle.<sup>10</sup> This useful formulation is both descriptive of what religious freedom has been in America and prescriptive of what it should be, both here and abroad.

Religious freedom in America was a social reality even before it became legal principle. For nearly two centuries before the founding of the Republic, one religious community after another came here to live their faith. Puritans, Congregationalists, Roman Catholics, Jews, Quakers, Baptists, Presbyterians, and Methodists all found refuge on these shores.<sup>11</sup> Professor Michael McConnell has written that in the years before the Revolution, America experienced a higher degree of religious diversity than existed anywhere else in the world.<sup>12</sup>

Religious freedom was social reality in America not only as a matter of history, but also by design. America’s Founders, including George Washington, spoke about religion’s role in helping to create good citizens.<sup>13</sup> The Massachusetts Constitution

10. Thomas Berg, *Faith, Freedom, and the First Amendment: The Guarantee of Religious Liberty*, HERITAGE FOUND. (Mar. 29, 2012), <http://www.heritage.org/research/reports/2012/03/faith-freedom-and-the-first-amendment-the-guarantee-of-religious-liberty>. Professor Berg uses the phrase “constitutional principle,” but because of a Supreme Court decision religious freedom is no longer strongly protected by the Constitution but instead by a U.S. statute. See *infra* notes 52–68 and accompanying text. As a result, this paper uses the term “legal principle” to cover both constitutional and statutory protections.

11. See LIBRARY OF CONG., *America as a Religious Refuge: The Seventeenth Century, Part 1*, in RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC, <http://www.loc.gov/exhibits/religion/rel01.html> (last visited Sept. 9, 2015) (“Many of the British North American colonies that eventually formed the United States of America were settled in the seventeenth century by men and women, who, in the face of European persecution, refused to compromise passionately held religious convictions and fled Europe.”).

12. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990); see also THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986).

13. See George Washington, *The Address of General Washington to the People of the United States on His Declining of the Presidency of the United States*, AM. DAILY ADVERTISER (Phila.), Sept. 17, 1796, available at, <http://www.mountvernon.org/educational-resources/primary-sources-2/article/washingtons-farewell-address/> (“Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens.”); see

of 1780 similarly declared that general happiness, good order, and civil government all depend on “piety, religion, and morality.”<sup>14</sup> And the eminent Alexis de Tocqueville, writing in the nineteenth century, observed that Americans across all classes and parties believed that religion is indispensable to the maintenance of well-functioning political institutions.<sup>15</sup>

The positive and practical value of religious freedom, for both individuals and nations, was an article of faith at America’s founding and continues to be the subject of study and scholarship today. Professor Mary Ann Glendon of Harvard, for example, has spoken about how violence tends to be greater in societies that suppress religious liberty and how religious freedom correlates with democratic longevity.<sup>16</sup>

Looking beyond America reveals that religious freedom is the oldest of the internationally recognized human rights, with a heritage going back at least to the Reformation Era in Europe.<sup>17</sup> In 1948, after the horror of World War II, the United States joined many other nations in signing the Universal Declaration of Human Rights.<sup>18</sup> Article 18 of that Declaration states that every person has a

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also John Adams, Diary (Feb. 18, 1756), in 1 THE ADAMS PAPERS: DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS, 1755–1770 8 (L.H. Butterfield ed., 1961) (“[T]he design of Christianity was not to make men good Riddle Solvers or good mystery mongers, but good men, good magistrates [sic] and good Subjects . . .”); BENJAMIN RUSH, *Of the Mode of Education Proper in a Republic*, in ESSAYS, LITERARY, MORAL AND PHILOSOPHICAL 8 (2d ed., Phila., Thomas & William Bradford 1806) (“It is foreign to my purpose to hint at the arguments which establish the truth of Christian revelation. My only business is to declare, that all its doctrines and precepts are calculated to promote the happiness of society, and the safety and well being of civil government.”).

14. MASS. CONST. pt. I, art. III, *amended by* MASS. CONST. amend. art. XI, *available at* <https://malegislature.gov/laws/constitution> (last visited Nov. 5, 2014).

15. 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* pt. 2, ch. 17 (Gerald E. Bevan trans., Penguin Books 2003) (1840).

16. See Mary Ann Glendon, *The Quest for Peace Fifty Years After Pacem in Terris—What Role For Religion?*, in 18 PONTIFICAL ACAD. OF SOC. SCI. 584, 601 (Mary Ann Glendon et al. eds., 2013), [www.pass.va/content/dam/scienzesociali/pdf/acta18/acta18-glendon.pdf](http://www.pass.va/content/dam/scienzesociali/pdf/acta18/acta18-glendon.pdf); see also BRIAN J. GRIM & ROGER FINKE, *THE PRICE OF FREEDOM DENIED: RELIGIOUS PERSECUTION AND CONFLICT IN THE 21ST CENTURY* (2011) (providing extensive empirical data supporting the linkage of religious freedom to numerous other social goods, and documenting the reality that religious violence tends to be higher in countries without religious freedom).

17. See W. Cole Durham, Jr., *Perspectives on Religious Liberty: A Comparative Framework*, in RELIGIOUS HUMAN RIGHTS IN GLOBAL PERSPECTIVE: LEGAL PERSPECTIVES 1, 1 (Johan D. van der Vyver & J. Witte, Jr. eds., 1996).

18. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

fundamental right to freedom of religion, including “freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.”<sup>19</sup> This declaration not only identifies religious freedom as a universal human right, but also describes that right in a full and robust way with three essential dimensions. First, it is freedom not only of belief, but also of behavior.<sup>20</sup> Second, it is freedom that may be exercised publicly as well as privately.<sup>21</sup> And third, it is freedom to act both individually and collectively.<sup>22</sup>

In 1998, Congress unanimously affirmed the importance of religious freedom by enacting the International Religious Freedom Act, which created an Ambassador-at-Large for International Religious Freedom within the Department of State and established the U.S. Commission on International Religious Freedom.<sup>23</sup> Its findings state that religious freedom not only “undergirds the very origin and existence of the United States”<sup>24</sup> but also is “a universal human right”<sup>25</sup> and a “fundamental right of every individual.”<sup>26</sup> The Commission’s immediate past chairman, Professor Robert George of Princeton, has written about what he calls religious freedom in its most robust sense.<sup>27</sup> Religious freedom is far more than a mere right to worship or to believe in private, he said, but “the right to express one’s faith in the public as well as private sphere . . . .”<sup>28</sup> According to Professor George, “to overcome the powerful and broad

19. *Id.* art. 18.

20. *See* *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940); *Coulee Catholic Sch. v. Labor & Indus. Review Comm’n, Dep’t of Workforce Dev.*, 768 N.W.2d 868, 879 (Wis. 2009) (stating that the freedoms granted in the first amendment “protects not only the right to freedom in what one believes, but extends (with limitations) to acting on those beliefs”).

21. *See* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2797 (2014).

22. *Coulee Catholic Sch.*, 768 N.W.2d at 879.

23. International Religious Freedom Act, 22 U.S.C. § 6401 (1998).

24. 22 U.S.C. § 6401(a)(1) (2014). Ninety-five percent of Americans, in fact, believe that “[o]ne of the main reasons America was founded was to enable people of all faiths to have the freedom to believe and practice whatever religion they choose.” *Survey Fact Sheet: Americans’ Views on Religious Freedom*, AM. RELIGIOUS FREEDOM (Dec. 2, 2011), <http://www.religiousfreedom.org/research/detail/survey-fact-sheet-americans-views-on-religious-freedom>.

25. 22 U.S.C. § 6401(a)(2).

26. *Id.* § 6401(a)(3).

27. *See* Robert P. George, *What is Religious Freedom?*, WITHERSPOON INST. (July 24, 2013), <http://www.thepublicdiscourse.com/2013/07/10622/>.

28. *Id.*

presumption in favor of religious liberty, . . . political authority must meet a heavy burden.”<sup>29</sup>

The last several American presidents have issued an annual proclamation naming a day in January as Religious Freedom Day, commemorating the passage in 1786 of the Virginia Statute for Religious Freedom. President Bill Clinton, for example, reminded us that religious freedom is both a natural right and an element essential to our well-being and dignity as human beings.<sup>30</sup> President George W. Bush similarly said that religious freedom is a cornerstone of the American republic and a fundamental human right that contributes to stable democracy.<sup>31</sup>

Religious freedom must be not only social reality, but also legal principle. America’s Founders knew that liberty requires limits on government, but were divided about the nature and extent of those limits. Some thought that listing the powers of Congress in a written constitution would alone be enough, that such enumeration would be effectively self-limiting.<sup>32</sup> Others were more skeptical about governmental power and demanded affirmative protection for particular rights.<sup>33</sup> The skeptics won the day, and the first individual right named in the Bill of Rights for protection against government infringement is the free exercise of religion.<sup>34</sup> The wording chosen to identify this right is significant. The First Amendment protects more than a particular exercise of religion. It protects more than the exercise of religion by certain people. Rather, the First Amendment

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29. *Id.*

30. *Proclamation 6966 of January 16, 1997: Religious Freedom Day, 1997*, 3 C.F.R., 1997, Comp. 1 (1998).

31. *Proclamation 7517 of January 15, 2002: Religious Freedom Day, 2002*, 3 C.F.R., 2002, Comp. 1 (2003).

32. See THE FEDERALIST NO. 41 (James Madison) (“Had no other enumeration or definition of the powers of the Congress been found in the Constitution, than the general expressions just cited, the authors of the objection might have had some color for it; though it would have been difficult to find a reason for so awkward a form of describing an authority to legislate in all possible cases.”).

33. See THE ANTI-FEDERALIST NO. 84 (Brutus), available at <http://www.thefederalistpapers.org/antifederalist-paper-84> (“When a building is to be erected which is intended to stand for ages, the foundation should be firmly laid. The Constitution proposed to your acceptance is designed, not for yourselves alone, but for generations yet unborn. The principles, therefore, upon which the social compact is founded, ought to have been clearly and precisely stated, and the most express and full declaration of rights to have been made. But on this subject there is almost an entire silence.”).

34. U.S. CONST. amend. I.

protects the free exercise of religion itself, a phrase that had been in use for more than a century before Madison incorporated it in the Bill of Rights.<sup>35</sup>

So we have seen how genuine religious freedom exists when its three components—belief and behavior, public and private, individual and collective—are experienced as social reality and established in legal principle and when religious freedom is embraced as a fundamental or preferred value.

## II. HOW RELIGIOUS FREEDOM IS UNDER ATTACK

Unfortunately, there is substantial evidence that religious freedom in America is eroding. In terms of social reality, while eighty-two percent of Americans say that religion is important in their personal lives,<sup>36</sup> three-quarters believe religion is losing its influence in our society—the highest level ever.<sup>37</sup>

In several ways, pressure is mounting to deprive religious freedom of its preferred status in the cultural and political life of our nation. For example, arguments have been made in both the political arena and in our nation's courts that laws should not—and even may not—be based on religious considerations.<sup>38</sup> Elder Dallin H. Oaks of the Church of Jesus Christ of Latter-day Saints addressed this notion several months ago at Utah Valley University's Constitutional Symposium on Religious Freedom.<sup>39</sup> The argument against basing laws on religious considerations rests on the view that religion is a purely private matter and, therefore, public debate and political decision-making may legitimately be based only on so-called public reason, which is defined as excluding religious values and

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35. McConnell, *supra* note 12, at 1425.

36. PEW FORUM ON RELIGION & PUBLIC LIFE, *U.S. Religious Landscape Survey: Religious Beliefs and Practices: Diverse and Politically Relevant June 2008*, at 22 (2008), available at <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

37. PEW RESEARCH CENTER, *Public Sees Religion's Influence Waning: Growing Appetite for Religion in Politics*, at 1, 44 (2014), available at <http://www.pewforum.org/files/2014/09/Religion-Politics-09-24-PDF-for-web.pdf>.

38. CYNTHIA BROUGH, CONG. RESEARCH SERV., R41824, APPLICATION OF RELIGIOUS LAW IN U.S. COURTS: SELECTED LEGAL ISSUES 1 (2011).

39. Elder Dallin H. Oaks, member of the Quorum of the Twelve Apostles, The Church of Jesus Christ of Latter-Day Saints, Keynote Address at Utah Valley University's Constitutional Symposium on Religious Freedom: Hope for the Years Ahead (Apr. 16, 2014), available at <http://www.mormonnewsroom.org/article/transcript-elder-dallin-oaks-constitutional-symposium-religious-freedom>.



expression.<sup>40</sup> This view attacks all three of the dimensions of religious freedom that I described earlier. It insists that religion is limited to belief, not behavior; that religious exercise is individual, not collective; and, especially, that religion is something that should be conducted in private, not in public.

Religious freedom as legal principle is also at risk in at least two ways. The first is a general decline in American citizens' knowledge about the Constitution, America's history and heritage, and our form of government. James Madison, a principle author of the Constitution, wrote that "a well-instructed people alone can be permanently a free people."<sup>41</sup> Citizens cannot understand, let alone defend, what they do not know. Yet today, poll after poll shows that Americans are shockingly ignorant of even the most basic matters relating to their nation's history, system of government, and even of their own liberty.<sup>42</sup> Author James Bovard aptly calls this "attention deficit democracy."<sup>43</sup>

This general decline in Americans' knowledge about government sets the stage for the second way in which religious freedom as legal principle is threatened. For 150 years after America's Founding, a consensus existed that judges have only a modest role in interpreting our written Constitution.<sup>44</sup> Because the Constitution expresses the people's will about government power and individual rights, that consensus maintained, only the people have authority to change the Constitution.<sup>45</sup> Ignorance about American history, our political system, and the requirements of liberty allowed a radical transformation in the courts. Since the 1930s, presidents have increasingly appointed judges willing to impose their own meaning

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40. See David Kennedy, *Losing Faith in the Secular: Law, Religion and International Governance*, in 4 GRAVEN IMAGES: TRANSGRESSION, PUNISHMENT, RESPONSIBILITY AND FORGIVENESS 138 (1998); see also Leslie Griffin, *The Relevance of Religion to A Lawyer's Work: Legal Ethics*, 66 FORDHAM L. REV. 1253, 1264 (1998) ("The professional public reason norm suggests that religion is private and personal, not public.").

41. James Madison, President, United States, State of Union Address (Dec. 5, 1810), available at <http://www.infoplease.com/t/hist/state-of-the-union/22.html>.

42. For a sample of these poll results, see Thomas L. Jipping, *Which is to be Master?: The People, Judges, and the Constitution's Meaning*, 2 LIBERTY U. L. REV. 419, 420–21 nn. 8–15 (2008).

43. JAMES BOVARD, ATTENTION DEFICIT DEMOCRACY 2 (2007).

44. See Thomas L. Jipping, *"Judge Thomas is the First Choice": The Case for Clarence Thomas*, 12 REGENT U. L. REV. 397, 401–12 (2000).

45. See Orrin G. Hatch, *Judicial Nomination Filibuster Cause and Cure*, 2005 UTAH L. REV. 803, 808–12.

on the Constitution rather than draw the people's meaning from it.<sup>46</sup> I mention this because the personal values and preferences these activist judges have imposed have often been hostile to religion and religious freedom.<sup>47</sup>

The First Amendment prohibits government establishment of religion and protects the free exercise of religion.<sup>48</sup> America's Founders viewed the Establishment Clause narrowly and the Free Exercise Clause broadly, a combination that allowed for robust religious freedom and an active role for religion in public life.<sup>49</sup> Judges who have felt free to impose their own values, however, have consistently reversed that order, interpreting the Establishment Clause broadly and the Free Exercise Clause narrowly. The result has been an ever-continuing constriction of religious freedom and an increasingly muted role for religion in public life.

For example, in the 1992 case *Lee v. Weisman*, the Supreme Court held that an invocation before a public school graduation ceremony was an establishment of religion prohibited by the First Amendment.<sup>50</sup> Such invocations had been common throughout our history and are still practiced in legislatures across America, including in the U.S. Senate, where I serve. The argument seemed to be, at least in the public school context, that the mere uttering of religious words in the form of a prayer was an unconstitutional establishment of religion.<sup>51</sup>

46. See Priscilla H. Machado, *Nothing Personal*, 80 JUDICATURE 294 (1997) ("Toward the end of his life, Harry Truman was asked about his appointment of Tom Clark to the Supreme Court and whether he was trying to 'pack' the high bench. Truman replied, 'Hell yes! All presidents try to pack the Court.' Truman's comment tells us what is accepted as common knowledge about the judiciary and politics—that the appointment of Supreme Court justices is politicized.").

47. HUGO BLACK, JR., MY FATHER: A REMEMBRANCE 176 (1975) (only "hypocrites" attend church).

48. U.S. CONST. amend. I.

49. See generally *Introduction to the Establishment Clause*, EXPLORING CONSTITUTIONAL CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/estabinto.htm> (last visited Sept. 16, 2015).

50. 505 U.S. 577, 610 (1992).

51. *Id.* But see Zachary D. Smith, *Commandments, Crosses, & Prayers: The Roberts Court's Acceptance of and Approach to Public Religion*, 2015 BYU L. REV. 845, 860–64 (2015) (explaining how the U.S. Supreme Court has allowed for prayers in a town council meeting and is moving closer back to the narrower view of the Establishment Clause).

While the *Weisman* decision broadened the meaning of the Establishment Clause, a decision two years earlier narrowed the Free Exercise Clause.<sup>52</sup> The Supreme Court had for decades held that government action burdening religious exercise must meet a legal standard called strict scrutiny that requires a compelling justification for the government's action.<sup>53</sup> Applying this standard to free exercise claims identifies the free exercise of religion as a preferred value while also allowing for some restrictions under narrow circumstances.

An Oregon state law prohibited the use of controlled substances, including the drug peyote.<sup>54</sup> Two Native American state employees were fired for using peyote in their religious ceremonies and argued that this violated their First Amendment right to freely exercise their religion.<sup>55</sup> The U.S. Supreme Court disagreed, rejecting the view that there must be religious exemptions for generally applicable laws such as Oregon's controlled substance ban.<sup>56</sup> Instead, it held that the strict scrutiny standard would apply only to government action explicitly targeting religion, not to generally applicable laws that may burden religious exercise in individual cases.<sup>57</sup>

This 1990 decision, *Employment Division v. Smith*,<sup>58</sup> was deeply troubling. By significantly narrowing the circumstances in which religious exercise would be protected as a preferred value subject to strict scrutiny, the Court significantly broadened the circumstances in which it would be treated as a common value subject to all sorts of government controls. Even though neither party in *Smith* had challenged the prevailing standard for free exercise cases,<sup>59</sup> the Court in one decision reversed decades of precedent, disregarded centuries of practice,<sup>60</sup> and threatened to upend religious liberty's status as a preferred value in American society.

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52. See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990).

53. *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406–07 (1963).

54. *Smith*, 494 U.S. at 874.

55. *Id.*

56. See *id.* at 878–79, 893–94.

57. See *id.* at 894–95.

58. *Id.*

59. See *id.*

60. See Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 153 (1997) (“In . . . *Smith*, the Court overturned precedent and adopted a narrow view of the Free Exercise Clause of the First Amendment. Under this view, ‘neutral, generally applicable laws’ are categorically exempt from

In response to this threat to religious freedom, I helped lead a campaign to reverse the Supreme Court's *Smith* decision and restore heightened protection for religious liberty. The culmination of these efforts was the Religious Freedom Restoration Act, or RFRA,<sup>61</sup> which I supported in the United States Senate. RFRA was the rare bill that attracted broad, indeed nearly unanimous, bipartisan support.<sup>62</sup>

RFRA's purpose was to assert broad legislative protection for the exercise of religion that the Court's decision in *Smith* had severely limited. To this end, the bill stated that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."<sup>63</sup> This prohibition puts the exercise of religion again at the center. It means that government action must be evaluated not for its technical form, that is, whether it explicitly targets religion, but for its effect on religious exercise.<sup>64</sup> It reasserts religious freedom as a preferred value. Government may not pass laws or take action that substantially impedes a person's practice of religion, even when the law is targeted to some other, nonreligious purpose and affects everyone—religious and nonreligious—equally.<sup>65</sup> Nor is there any limit on subject matter. All government action that substantially burdens religious liberty is prohibited, regardless of whether it involves the environment, education, transportation, or health care.<sup>66</sup>

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constitutional scrutiny, even when they prohibit or substantially burden religious exercise.); see also Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1045–46 (2000) ("The Smith ruling effected a fundamental shift in free exercise jurisprudence: It replaced the traditional compelling state interest test that had been utilized in religious accommodation cases since *Sherbert v. Verner* with a test that presumes the constitutionality of any neutral, generally applicable law, even if it unintentionally burdens the free exercise rights of religious citizens. The *Sherbert* test would still apply, however, to a narrow group of cases in which religious observers challenge laws or regulations containing a 'mechanism for individualized exemptions.'").

61. Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb–2000bb-4, *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

62. U.S. Senate Roll Call Votes 103rd Congress–1st Session, U.S. SENATE (Oct. 27, 1993, 10:25 AM), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=103&session=1&vote=00331](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00331).

63. 42 U.S.C. § 2000bb-1(a) (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

64. *Id.*

65. *See id.*

66. *See id.*

The more precious something is, the more that needs to be done to protect it. RFRA reflected the fundamental and preferred status of religious freedom by setting a very high bar for government action. Under RFRA, government may substantially burden a person's exercise of religion only if doing so is the least restrictive means of advancing a compelling government purpose.<sup>67</sup> In order to intrude on religious liberty, government must have a very good reason for doing so, and the intrusion must be necessary to accomplishing that reason. If there is an alternative way to accomplish the same result that does not intrude on religious liberty, government must take it. Put differently, government may intrude on religious liberty only when it has no other choice. This restores religious freedom to its proper preferred place in the pantheon of values.

As you can see, RFRA is an expansive statute. It applies to all government action, and requires government to satisfy strict conditions before it can intrude on religious liberty. Equally broad, however, was the coalition that passed RFRA, which passed the House of Representatives unanimously.<sup>68</sup> There was not a single dissenting vote. In comparison, even the vote to authorize the use of military force against Al Qaeda following 9/11 was not unanimous.<sup>69</sup> RFRA then passed the Senate 97–3.<sup>70</sup> RFRA was a broad law supported by a broad coalition that recognized the law's expansive scope. President Clinton signed it into law on November 16, 1993.<sup>71</sup> Twenty years ago, there was widespread agreement as to religious liberty's preferred status and the fact that government should have to exhaust all other possible avenues before intruding on religious rights.

RFRA itself has not had an uncomplicated history. In 1997, the Supreme Court held that Congress lacked constitutional authority to impose a stricter standard of religious freedom protection on the

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67. *Id.*

68. 139 CONG. REC. H2356-63 (daily ed. May 11, 1993).

69. *Final Vote Results for Roll Call 342*, H.J. Res. 64, (Sept. 14, 2001, 11:17 PM), <http://clerk.house.gov/evs/2001/roll342.xml>; *U.S. Senate Roll Call Votes 107th Congress–1st Session*, S.J. Res. 23, U.S. SENATE (Sept. 14, 2001, 10:44 AM), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=107&session=1&vote=00281](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&session=1&vote=00281) (98 Yeas and 2 not voting).

70. 139 CONG. REC. 26392, 26416 (1993) (Roll call Vote No. 331 Leg.).

71. See Peter Steinfeld, *Clinton Signs Law Protecting Religious Practices*, N.Y. TIMES, Nov. 17, 1993, at A18.

states than the Supreme Court had decreed in *Smith*.<sup>72</sup> Significantly, twenty-one states have adopted state religious freedom restoration acts,<sup>73</sup> and courts in another eleven states have accomplished the same result by construing their state constitutions to require heightened scrutiny of religious freedom claims.<sup>74</sup> Only four states have explicitly followed the reasoning of the *Smith* decision.<sup>75</sup> Thus, while the Supreme Court narrowed the protections provided by RFRA to some extent, the majority of states have followed the lead established by Congress in passing RFRA.

But times have changed. Where once there was broad agreement, now there is discord. Earlier this year, in a case titled *Burwell v. Hobby Lobby Stores*, the Supreme Court held that the Affordable Care Act's birth control mandate did not sufficiently accommodate the free exercise of religion.<sup>76</sup> The plaintiffs in the case argued that bearing the cost of providing certain birth control products would violate their deeply held religious beliefs regarding the sanctity of life.<sup>77</sup> In ruling for the plaintiffs, the Court found that there were available less restrictive means of accomplishing the policy objective of providing insurance coverage for birth control.<sup>78</sup> The majority in *Burwell* thus took advantage of the strong protections created by RFRA, but consensus has declined and the decision has been controversial.<sup>79</sup>

72. City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997).

73. See *State Religious Freedom Restoration Acts*, NAT'L CONF. ST. LEGISLATURES (Oct. 15, 2015), <http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx>; Don Byrd, *State RFRA Bill Tracker*, BAPTIST JOINT COMM. FOR RELIGIOUS LIBERTY (March 4, 2015), <http://bjconline.org/state-rfra-tracker-2015/>.

74. WILLIAM W. BASSETT, W. COLE DURHAM, JR. & ROBERT T. SMITH, RELIGIOUS ORGANIZATIONS AND THE LAW § 2:63 (2013).

75. Eugene Volokh, 1A. *What Is the Religious Freedom Restoration Act?*, VOLOKH CONSPIRACY (Dec. 2, 2013, 7:43 AM), <http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/>.

76. 134 S. Ct. 2751 (2014); see also Leilani N. Fisher, *Institutional Religious Exemptions: A Balancing Approach*, 2014 BYU L. REV. 415 (2014) (explaining the challenges as well importance of religious accommodations).

77. *Burwell*, 134 S. Ct. at 2764–65.

78. *Id.* at 2780.

79. U.S. Senator Gary Peters of Michigan said, "Today's Supreme Court decision is a dangerous step backwards for women's health and could significantly impact women in Michigan and across the country by leaving them without access to essential health care services. Women, not their bosses, should make their personal health care decisions. I'm ready to work with my colleagues to ensure that women have to the right to determine what's best for them without interference from their employers." Aimee Plesa, *Controversial Decision*

Set against the broad backdrop of American history, of religious freedom as both social reality and legal principle, the Court's decision was not remarkable at all. Religious freedom is a fundamental right under the Constitution and a preferred value under federal law. Congress and regulatory agencies must therefore give religious freedom its proper place when setting policy.

As with *Smith*, members of Congress responded to the *Burwell* decision with legislation to overturn it.<sup>80</sup> But there was a key difference. In 1993, Congress responded to the *Smith* decision that had weakened religious freedom with legislation to protect it. In 2014, however, a mere twenty years later, members of Congress—including some who had voted for RFRA—responded to the *Burwell* decision that had protected religious freedom with legislation to weaken it.<sup>81</sup> For some, at least, the paradigm had completely flipped.

Nor are these attempts to weaken religious liberty in the wake of *Burwell* limited to the specific facts of that case. While *Burwell* dealt

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Reached in *Burwell v. Hobby Lobby*, EXAMINER.COM (June 30, 2014, 12:49 PM), <http://www.examiner.com/article/controversial-decision-reached-burwell-v-hobby-lobby>.

Senate Majority Leader Harry Reid of Nevada said, "If the Supreme Court will not protect women's access to health care, then Democrats will. We will continue to fight to preserve women's access to contraceptive coverage and keep bosses out of the examination room." *Id.*

80. See Patty Murray, *Summary of the Protect Women's Health from Corporate Interference Act*, MURRAY.SENATE.GOV (last visited Oct. 19, 2015) [http://www.murray.senate.gov/public/\\_cache/files/30554052-0f84-485a-babc-ccc04af85bb6/protect-women-s-health-from-corporate-interference-act---one-page-summary--final.pdf](http://www.murray.senate.gov/public/_cache/files/30554052-0f84-485a-babc-ccc04af85bb6/protect-women-s-health-from-corporate-interference-act---one-page-summary--final.pdf); see also Laura Bassett, *Major Doctors' Group Endorses Hobby Lobby Override*, HUFFINGTON POST (last updated July 14, 2014, 1:59 PM), [http://www.huffingtonpost.com/2014/07/14/major-doctors-group-endor\\_0\\_n\\_5585018.html](http://www.huffingtonpost.com/2014/07/14/major-doctors-group-endor_0_n_5585018.html).

81. Senator Patty Murray (D-WA) introduced S.2578, the Protect Women's Health From Corporate Interference Act of 2014, on July 9, 2014. S.2578, 113th Cong. (2014). It would prohibit employers from denying insurance coverage required by federal statute or regulation for any "a specific health care item or service." *Id.* §4. This prohibition applies "notwithstanding any other provision of Federal law, including Public Law 103-141." *Id.* Public Law 103-141 is RFRA. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993). Senator Murray and twelve co-sponsors of S.2578 co-sponsored or voted for RFRA in 1993 when they served in the House or Senate. *All Bill Information (Except Text) for S.2578 - Protect Women's Health from Corporate Interference Act of 2014*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2578/all-info> (last visited Oct. 22, 2015); News Release, Patty Murray, U.S. Senator, *Hobby Lobby: Murray, Udall Introduce Legislative Fix to Protect Women's Health in Aftermath of Supreme Court Decision* (July 9, 2014), available at <http://www.murray.senate.gov/public/index.cfm/2014/7/hobby-lobby-murray-udall-introduce-legislative-fix-to-protect-women-s-health-in-aftermath-of-supreme-court-decision>.

only with the Affordable Care Act's birth control mandate,<sup>82</sup> proposed legislative responses would exempt from RFRA's strict scrutiny requirement all federal laws and regulations relating to healthcare.<sup>83</sup> Just as *Smith* provoked a broad legislative response, so did *Burwell*. The difference is that in 1993 there was near-unanimity that religious liberty deserves the highest protection, whereas now, a significant portion of Congress believes religious liberty deserves no special protection, at least where health care is involved.

I have served in the U.S. Senate for nearly thirty-eight years and have been involved in developing, negotiating, drafting, and enacting thousands of bills. Rarely have I seen a bill that was clearer or simpler than the Religious Freedom Restoration Act. In 1993, Congress was nearly unanimous that the free exercise of religion was to continue in its preferred place in our hierarchy of values. Just twenty years later, many of the very Senators and House members who supported RFRA are now pushing legislation that would render it impotent.<sup>84</sup>

Another way in which religious freedom is being pulled down from its preferred status is through placing it in conflict with other rights, including statutory rights. This situation occurs, for example, when the constitutional right to freely exercise one's religion is said to conflict with a statutory right to be free from discrimination.

The U.S. Supreme Court addressed this issue in 2012 in the case *Hosanna-Tabor Evangelical Lutheran Church v. EEOC*.<sup>85</sup> In *Hosanna-Tabor*, a religious denomination argued that its First Amendment right to determine who could serve as its ministers created an exception to a federal law prohibiting employment discrimination.<sup>86</sup> Ordinarily, the proposition that statutes must conform to the Constitution is accepted as an obvious principle.<sup>87</sup> A

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82. *Burwell*, 134 S. Ct. at 2759.

83. See Murray, *supra* note 80.

84. See *id.* Nineteen House members who co-sponsored H.R. 5051, the companion bill to S.2578, co-sponsored RFRA. Protect Women's Health From Corporate Interference Act of 2014, H.R. 5051, 113th Cong. (2014); Protect Women's Health From Corporate Interference Act of 2014, S.2578, 113th Cong. (2014).

85. 132 S. Ct. 694 (2012).

86. *Id.* at 701.

87. See U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any



conflict between the two typically comes before the courts when a party alleges that a statute violates the Constitution. This case, however, came to the Supreme Court in the opposite posture. The plaintiff employee argued, in effect, that the Constitution violated the statute.<sup>88</sup>

The Supreme Court, thankfully, rejected this twisted view, and instead vindicated a First Amendment right among churches to choose their ministers free from governmental interference.<sup>89</sup> Notwithstanding this clear judicial victory, however, the case revealed something very disturbing about the Obama administration's view of religious freedom. The administration argued that there was no need for a special religious exception to federal discrimination law because both religious and secular groups already enjoy some level of protection under the First Amendment freedom of association.<sup>90</sup> As the Court explained in rejecting this "remarkable" proposition, the administration wrongly believed that "the First Amendment analysis should be the same, whether the association in question is the Lutheran Church, a labor union, or a social club."<sup>91</sup>

The President of the United States was arguing that a church's right to select its leader free from governmental interference was no different from that of a scout troop, a local Kiwanis club, or an intramural sports team. The administration, in effect, was asking the Court to read the Free Exercise Clause right out of the First Amendment and hold that a church is no different from any other group in terms of its relation to government. Churches, in the administration's view, are just another social group. Thankfully, the Supreme Court rejected this position unanimously, noting that "the text of the First Amendment itself . . . gives special solicitude to the rights of religious organizations."<sup>92</sup>

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State to the Contrary notwithstanding.").

88. See *Hosanna-Tabor*, 132 S. Ct. at 706.

89. The Court called "untenable" the Obama administration's position, which it described as "the remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers." *Id.* That view "is hard to square with the text of the First Amendment, which gives special solicitude to the right of religious organizations." *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 697.

Do not think, however, that the Obama administration has consistently argued that statutes trump the Constitution. Just last year, for example, the Obama administration argued to the Supreme Court that the federal Defense of Marriage Act violated the Fifth Amendment's implicit guarantee of equal protection.<sup>93</sup> The administration will promote same-sex marriage by arguing that an implicit constitutional right of equal protection trumps a statute but will promote its view of anti-discrimination policy by arguing that a statute trumps even an explicit constitutional right to religious exercise.

Let me offer one more example of the supposed conflict between religious liberty and anti-discrimination laws. Last year I supported the Employment Non-Discrimination Act, or ENDA,<sup>94</sup> which would prohibit discrimination in hiring and employment on the basis of sexual orientation or gender identity.<sup>95</sup> The bill, which contained a robust exemption for religious organizations,<sup>96</sup> struck the right balance between religious liberty and other rights. It advanced the cause of equality by prohibiting workplace discrimination against gays and lesbians but also protected the rights of religious organizations. In this way, it maintained religious liberty as a preferred right. Some gay rights groups, however, have since withdrawn their support for ENDA because of its religious exemption.<sup>97</sup> In their view, religious groups should

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93. *United States v. Windsor*, 133 S. Ct. 2675, 2683–84 (2013) (“While the tax refund suit was pending, the Attorney General of the United States notified the Speaker of the House of Representatives, pursuant to 28 U.S.C. § 530D, that the Department of Justice would no longer defend the constitutionality of DOMA’s § 3. . . . [T]he Attorney General informed Congress that ‘the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.’ . . . [T]he Executive’s own conclusion, relying on a definition still being debated and considered in the courts, [was] that heightened equal protection scrutiny should apply to laws that classify on the basis of sexual orientation.”).

94. 159 CONG. REC. S.7894 (daily ed. Nov. 7, 2013); *see also* Ed O’Keefe, *Who Voted for the Employment Non-Discrimination Act?*, WASH. POST (last updated Nov. 7, 2013, 4:43 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/11/07/who-voted-for-the-employment-non-discrimination-act/>.

95. 159 CONG. REC. S.7894.

96. *See id.* Section 6(a) of the bill incorporated the religious exemption from Title VII of the Civil Rights Act. *Id.* Section 6(b) further prohibited government actions against an employer that qualifies for the religious exemption. *Id.*

97. *See* Tierney Sneed, *Why LGBT Groups Turned on ENDA*, U.S. NEWS & WORLD REP. (July 9, 2014, 1:51 PM), <http://www.usnews.com/news/articles/2014/07/09/why-lgbt-groups-turned-on-enda>.

be treated just like any other groups, and the principle of equality should trump the right to religious liberty.<sup>98</sup> Far from giving religious freedom preferred status, these groups would subsume it beneath other values.

The U.S. Supreme Court begins its new term tomorrow, the first Monday in October. On Tuesday, the Court will consider a case presenting once again the question whether religious freedom remains a preferred value in American law and culture.<sup>99</sup> In 2000, I introduced—and Congress unanimously passed—the Religious Land Use and Institutionalized Persons Act. This law applies the same protective standard found in RFRA to the contexts of incarceration and local zoning practices.<sup>100</sup>

In the case to be argued this week, a Muslim prisoner in Arkansas was denied permission to grow a half-inch beard that his faith requires, even though the state allows prisoners to grow beards for *medical* reasons.<sup>101</sup> As I described earlier, neither the First Amendment nor RFRA make religious exercise an absolute value. But it is a *preferred* value. This case is important because measuring whether a particular policy is the least restrictive means available or a particular purpose is compelling may be different in the prison context. For that reason, the Court's decision may signal whether religious freedom remains a preferred value.<sup>102</sup>

### III. PRESERVING AND PROTECTING RELIGIOUS FREEDOM

Tonight I have painted what seems like a negative picture. Religious freedom in its three-fold dimension is being eroded and weakened as both social reality and legal principle. It is increasingly viewed not as a fundamental right, or even as a preferred value, but

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98. Rea Carey, Op-Ed., *Why One of the Biggest LGBT Orgs Has Stopped Supporting ENDA*, ADVOCATE (July 8, 2014, 12:02 PM) (Rea Carey, the executive director of the National Gay and Lesbian Task Force Action Fund, stated: "As one of the lead advocates on this bill for 20 years, we do not take this move lightly but we do take it unequivocally—we now oppose this version of ENDA because of its too-broad religious exemption.").

99. See generally *Holt v. Hobbs*, 135 S. Ct. 853 (2015).

100. See Matthew Baker, Comment, *RLUIPA and Eminent Domain: Probing the Boundaries of Religious Land Use Protection*, 2008 BYU L. REV. 1213 (2008) (detailing the background and development of RLUIPA's land use protections).

101. *Holt*, 135 S. Ct. at 859.

102. *Id.* at 867 (holding that the grooming policies in place violated RLUIPA "insofar as it prevents petitioner from growing a 1/2-inch beard in accordance with his religious beliefs").

at best as one of many competing interests, and at worst as something that should be kept out of the public square altogether. This trend not only restricts religious liberty itself, but also limits the impact religious liberty has on society.

I said at the outset that Professor Berg's formulation of religious liberty as social reality and legal principle can be both descriptive and prescriptive,<sup>103</sup> and I turn now to the latter as I conclude my remarks. The solution to the problems I have identified is to strengthen religious freedom as both social reality and legal principle. That may sound simple, but I assure you, it is hardly simplistic.

It is also a great challenge, for as we have seen and as I have described only briefly, it has taken mere years to undermine and possibly destroy what it took centuries to build. Nor can the fundamental nature and preferred status of religious freedom be maintained merely by passing a statute or hoping that the courts properly interpret the First Amendment. Rather, I agree with Professor Glendon, who argues that whether religious freedom in the future will be a fundamental or a second-class right is primarily a cultural challenge.<sup>104</sup> Professor Glendon gave the 2011 Harold J. Berman Lecture at Emory University, and I commend it for your consideration.<sup>105</sup> In her lecture, Professor Glendon endorsed legal and political efforts to defend religious liberty, but also said that in the end, success "will depend even more on the attitudes and actions of religious believers and leaders themselves."<sup>106</sup> I think Professor Glendon is exactly right that the defense of religious liberty in the coming years will be primarily a cultural challenge. In candor, I am deeply dismayed at the way we have come to treat religion in our society.

Much of this can be laid at the feet of the media. So much of what I see or hear in movies, on the radio, and particularly on television seems to scorn or degrade religion. Churches and charities are depicted as corrupt and self-indulgent. Late-night comics treat believers as buffoons while reporters give more attention to atheists and agnostics who belittle our religious heritage even as they enjoy

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103. See Berg, *supra* note 10.

104. Mary Ann Glendon, *The Harold J. Berman Lecture: Religious Freedom—A Second-Class Right?*, 61 EMORY L.J. 971, 971–72 (2012).

105. *Id.*

106. *Id.* at 990.

more media coverage and a more lavish lifestyle than any parish priest.<sup>107</sup>

When did religion become such a negative thing? Where have the Father O'Malleys and the Pat O'Briens gone? How many movies must we endure where the villain is a priest or a pastor? One might be excused for thinking that, based on representations in popular media, our religious organizations are forces for evil rather than the backbone of much that is good and generous in our society.

But we cannot lay all the blame at the feet of the media. To do so would be to pretend that we—academics, government leaders, journalists—are powerless. But we are not. Even if we cannot control what media elites put out, we can work within our own spheres of influence to remind our fellow citizens of our shared religious heritage and the tremendous good religion has accomplished in our society.

First, we must be resolute against efforts to remove our religious heritage from educational curricula. I do not mean here to get into controversies such as whether the United States is a “Christian nation.”<sup>108</sup> Rather, I mean to suggest that we should be honest with our children about the profound—and profoundly positive—impact that religion had on some of our greatest leaders. It is fashionable to question the Christianity of Washington and volumes have been written on Jefferson’s heterodoxy, but the fact remains that nearly all of our greatest leaders, from Washington to Lincoln to Martin Luther King, Jr., were men of faith who found deep strength in their religious convictions.<sup>109</sup> Our heroes were religious men. To teach this

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107. See, e.g., Cynthia Littleton & Justin Kroll, *Seth MacFarlane Buys Beverly Hills Building as His Empire Grows (Exclusive)*, VARIETY (Sept. 16, 2013, 2:44 PM), <http://variety.com/2013/biz/news/seth-macfarlane-buys-beverly-hills-building-as-his-empire-grows-exclusive-1200613781/> (demonstrating the extravagance and lavish lifestyle maintained by Seth MacFarlane, a notable atheist). But cf. Erik Eckholm, *Family Battle Offers Look Inside Lavish TV Ministry*, N.Y. TIMES (May 4, 2012), <http://www.nytimes.com/2012/05/05/us/tbn-fight-offers-glimpse-inside-lavish-tv-ministry.html> (explaining the lavish lifestyle lived by Paul and Janice Crouch, well-known for their Christian television network, Trinity Broadcasting Network).

108. See, e.g., Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 939 (1996); Steven K. Green, *Understanding The “Christian Nation” Myth*, 2010 CARDOZO L. REV. DE NOVO 245, 248–49.

109. See, e.g., David A.J. Richards, *Ethical Religion and the Struggle for Human Rights: The Case of Martin Luther King, Jr.*, 72 FORDHAM L. REV. 2105, 2106 (2004).

is not to “inject” religion into a place it does not belong. It is simply to state the truth.

Second, we must reclaim the public square as a forum friendly for religion. Nearly seventy years ago the Supreme Court imposed upon the Establishment Clause its own view that the First Amendment effectively walls off religion from the public square.<sup>110</sup> While both historians and legal scholars have since proven the error in this interpretation, the idea has flourished into the widespread belief that religion has no place in school,<sup>111</sup> in government,<sup>112</sup> or anywhere in the public sector. This is simply wrong.

There should be room in all aspects of the public square for affirmations of religious devotion and recognition of the important role religion continues to play. This does not mean we need to lead schoolchildren in prayer. But it does mean we should allow students and government leaders to express religious views without condemnation and without criticism that religion is a purely private affair.

I am deeply concerned by the movement to cut off school funding for religious groups that require leaders to affirm the groups’ religious beliefs.<sup>113</sup> We should encourage, not hamstring, students’ efforts to join together with co-believers. It would be troubling, for example, if schools eliminated funding for religious groups while leaving funding for secular groups untouched.

Third, we must support efforts to partner government with religious and charitable organizations to reach underserved populations. I believe that one of President George W. Bush’s most important, and least heralded, initiatives was his effort to tap into the faith-based community’s ability to provide services to poor and

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110. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

111. See Eric Jeppsen, *Uneven “Neutrality”: Dual Standards and the Establishment Clause in Johnson v. Poway*, 2012 BYU L. REV. 543 (2012) (arguing against a Ninth Circuit case where a teacher could not put banners up in the classroom with the word “God” on them even though other professors could have similar banners with anti-religious messages).

112. See Steven Michael Lau, Note, *Ignoring Purpose, Context, and History: The Tenth Circuit Court in American Atheists, Inc. v. Duncan*, 2011 BYU L. REV. 149 (2011) (describing how the Tenth Circuit improperly disallowed the Utah Highway Patrol to use crosses in memory of fallen officers).

113. See, e.g., *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 668 (2010); see generally Devin Snow, Note, *Nondiscrimination and Religious Affiliation: The Ninth Circuit Upholds the Denial of Registered Status to a Christian Student Club in Alpha Delta Chi-Delta Chapter v. Reed*, 2012 BYU L. REV. 655 (2012).

underprivileged communities. President Bush recognized the tremendous work that religious groups do to care and support the needy.<sup>114</sup> He also recognized that faith-based groups can often provide services more cheaply and efficiently than government.<sup>115</sup> I am glad to report that in this area, President Obama, who spent time as a community worker himself earlier in life, has continued this laudable policy.<sup>116</sup> We should be supportive of efforts to partner government with faith-based organizations. These efforts show that government and religion are not antagonists, but partners.

Fourth, we should highlight the good that religious leaders do for our nation. To be sure, there are bad apples in American religion and throughout the world. But the bad apples do not spoil the whole barrel. Wouldn't it be nice, for a change, if among all the unrelenting negativity there were some positive stories about lives changed for the better? There are awards, degrees, honoraria, and prizes to be given. Commissions, boards, and panels to be filled. Books, papers, and studies to be written. Perhaps we could give greater thought to religious leaders in our communities that are deserving of such awards, or available to serve on such commissions, where their service can be recognized. Professional athletes and boorish musicians receive enough attention. Let's try to reserve some for our upstanding religious leaders.

Fifth, we should work harder to convince people that religious freedom is worth protecting, a point made by Professor Christopher Lund at Wayne State University.<sup>117</sup> For much of American history, we either assumed the answer or did not ask the question at all. But the heritage that began with social reality and became legal principle will not protect itself. Professor Lund writes that unless we do better at explicitly making this case, legislators will no longer enact laws such as RFRA, judges will not properly interpret constitutional provisions

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114. *White House Faith-Based & Community Initiative*, WHITE HOUSE: PRESIDENT GEORGE W. BUSH, <http://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html> (last visited Sept. 18, 2015).

115. *See id.* (noting that "[t]he ultimate beneficiaries are America's poor, who are best served when the Federal government's partners are the providers most capable of meeting their needs").

116. *See The White House Office of Faith-based and Neighborhood Partnerships*, WHITE HOUSE, <https://www.whitehouse.gov/administration/eop/ofbnp> (last visited Oct. 19, 2015).

117. *See* Christopher C. Lund, *Religious Liberty after Gonzales: A Look at State RFRA's*, 55 S.D. L. Rev. 466, 497 (2010).

and statutes protecting religious freedom, and religious liberty will indeed become a second-class right.<sup>118</sup>

Sixth, we must affirm our own individual faith and devotion. As community leaders, we have the ability to reach and influence broad audiences. By publicly affirming our faith, we both show that faith does have a place in the public sphere and show community members that their leaders place a priority on religion. This does not mean we should become public pastors. But it does mean we should not be shy about our own beliefs. By demonstrating that religion is important to our own self-identity and desire to serve, we show our community members that religion is a thing of value and source of motivation. And who knows? Showing others how religion has changed our lives may spark a desire in them to seek greater devotion in their own lives. There can be no greater protector of religious liberty than a society composed of individuals who value religious liberty in their own lives.

Changing culture is no easy thing, and we here in this room are too small a group to significantly alter a trajectory that has gone so far off course. But we here in this room are not the only people dedicated to religious liberty and concerned that it is retreating both here at home and across the world. The Pew Forum reports that three-quarters of the world's population lives in countries with high restrictions on religious practice from government policies or social hostilities, and that level is increasing.<sup>119</sup> In many places, religious freedom has never been social reality or legal principle.

Many of our neighbors and fellow community leaders share our concerns about religious liberty's retreat. By reasserting religious freedom's proper place, we can appeal to those who recognize the importance of religious liberty but are unsure how to proceed. By making the public square more friendly for religion, we can invite back into the square those who share our convictions but feel uncomfortable expressing those convictions in public. By working to make government and religion partners once more rather than antagonists, we can revivify the view that religion is a force for good rather than something to be swept under the rug. And by ensuring that our religious heritage maintains a robust role in our educational

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118. *Id.*

119. See *Latest Trends in Religious Restrictions and Hostilities*, PEW RES. CTR. (Feb. 26, 2015), <http://www.pewforum.org/2015/02/26/religious-hostilities/>.



curricula, we can ensure that our children understand that religion helped our heroes accomplish great things and made our nation what it is today.

Religion may never be fashionable in the way it once was. Our insular and insulated media elites will see to that. But if we can help our young people see religion as a force for good,<sup>120</sup> they will be more inclined to protect it and to stand up against secularists who seek to rid religion from our history books and banish it from our public discourse.

A 2011 survey revealed that ninety percent of Americans believe that religious freedom is an inherent right that is not granted by government.<sup>121</sup> That is perhaps a slim reed, but it is an essential belief for rebuilding the foundation of religious freedom. The preamble to our Constitution states that that charter was established to secure the blessing of liberty to ourselves and our posterity.<sup>122</sup> True religious freedom is essential for that security.

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120. In October of 2014, a coalition of faith groups announced the creation of Faith Works, a non-profit organization aimed at promoting the value of faith. *See Religious Groups Join Together to Launch Faith Counts*, PR NEWswire (Oct. 8, 2014), <http://www.prnewswire.com/news-releases/religious-groups-join-together-to-launch-faith-counts-278519041.html>. Members of this coalition included groups that earlier had joined to enact the Religious Freedom Restoration Act, such as the U.S. Conference of Catholic Bishops, Seventh-Day Adventist Church, and the Church of Jesus Christ of Latter-day Saints. *See generally* FAITHCOUNTS, <http://faithcounts.com/> (last visited Oct. 19, 2015).

121. *Survey Fact Sheet*, *supra* note 24.

122. U.S. CONST. pmbl.